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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JUL 07 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability and as a member of the professions holding an advanced degree. The petitioner seeks employment as an attorney. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief, later supplemented with evidence regarding his credentials.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The AAO agrees with the director that a separate finding regarding his claim of exceptional ability would be of no benefit to the petitioner. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on his own behalf [redacted] In a letter that accompanied the initial submission, the petitioner stated: "as a self-employed alien, I have served the national interest to a substantially greater degree than do others in the same field of law." In this respect, the petitioner noted three lines of evidence (exhibit citations omitted):

A. Recognition by and commendation from the incumbent President of the United States, President George W. Bush in a letter written to me personally.
The letter reads as follows:
"Dear Friend, on behalf of the entire leadership of your Republican Party, I would like to express our gratitude for all of your help. Due to your tireless efforts, we've been able to make so much progress here in Washington D.C[.] to keep our citizens safe, our economy prosperous and our families free. Thank you for agreeing to serve as a National Co-sponsor of the President's Dinner. . . ."
It should be noted that I am not a registered voter in the United States and do not belong to any political party. I believe our President referred to the Republican Party because he became the President under its platform. The letter from the President of the United States alone should be sufficient to qualify me for a national interest waiver because that letter came from the most powerful man on earth and the highest office holder in the United States.

B. Conferment of major awards on me by distinguished state and national organizations:
The following awards have been conferred on me to date:
i. The [redacted] award for pro bono legal services by the State Bar of California.
ii. [redacted] Award by [redacted] "in recognition of outstanding service and commitment to Republican ideals, and in particular for assistance and leadership in promoting a pro-business agenda including tax reform and fiscal responsibility."
iii. [redacted] by the [redacted] because "they said, in worthy and honest pursuit, has unequivocally earned this good and high tribute in recognition of their undying commitment, patriotic loyalty and dedication of service to President George W. Bush, the Republican Party and the United States of America."
iv. Admission into the [redacted]

C. Rendition of valuable advice at Washington D.C. to the United States Government at the invitation of the government on three separate occasions.
I was invited to Washington D.C. by the representatives of the United States Government on four separate occasions. I honored three out of the four invitations because I was sick on one occasion. I was invited to render legal opinion on some sensitive issues facing the United States such as immigration and tax reforms, border control and safety, withdrawal of troops from Iraq, among others. To the best of my knowledge, I was the only lawyer representing the State of California on each occasion. . . . In addition, each occasion included my attendance at the Presidential Dinner with President George Walker Bush, incumbent President of the United States.

The above list purports to show repeated high-level recognition of the petitioner, but is utterly silent as to the specific nature of the contributions that earned him that recognition. Also, almost none of the above claimed honors have anything to do with the petitioner's practice of law, the exception being [redacted] Award that the petitioner[redacted]. That award certificate acknowledged the petitioner's "voluntary provision of legal services to the poor." There is no evidence in the record about the significance of this award, or whether an attorney must meet any criteria other than provision of pro bono legal services to qualify for the award. In the absence of such evidence, the certificate in the record shows only that the petitioner provided an unspecified number of hours of pro bono legal services. The petitioner, in his introductory statement, repeatedly cites *Matter of New York State Dept. of Transportation*, but he did not quote the following passage: "pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible." *Id.* at 217 n.3.

All of the other cited materials relate directly to acknowledgment of campaign donations from the petitioner to various partisan election committees. The petitioner asserts that the letter from [redacted] is, by itself, strong evidence that he qualifies for the waiver. The petitioner minimizes the reference to "your Republican party," stating: "I believe our President referred to the Republican Party because he became the President under its platform." In quoting from the letter, the petitioner omitted this passage: "your support will go a long way toward maintaining and expanding our U.S. House and Senate majorities in the Fall." The following text appears in fine print at the bottom of the letter: "Paid for by The [redacted], a joint fundraising committee on behalf of the [redacted] and the [redacted]" This internal evidence indicates that "The President's Dinner" was a partisan fundraising event in support of Republican candidates for Congress.

The petitioner submitted copies of several certificates from the [redacted], some of which also mention the House Republican Trust. With respect to the petitioner's claim that he "was invited to render legal opinion" "by the representatives of the United States Government," the record contains a copy of an invitation which reads:

House Republican
* TRUST *

THE REPUBLICAN MEMBERS
OF
THE U.S. HOUSE OF REPRESENTATIVES
cordially invite
[the petitioner]
as a
Member of the
HOUSE REPUBLICAN TRUST
representing California at the

[redacted]
and the
[redacted] DINNER
Featuring
[redacted]

There is no evidence that any government agency or entity solicited the petitioner's advice or opinions on matters of policy. Instead, the invitations such as the above appear to relate to still more partisan fundraising events.

On [redacted], the director advised the petitioner of the director's intent to deny the petition. The director acknowledged that the petitioner qualifies as a member of the professions holding an advanced degree, but found that the petitioner had not shown eligibility for the national interest waiver. The director stated that the petitioner received the letter from [redacted] "as a thank you for co-sponsoring The President's Dinner, not in recognition for any achievements or significant contributions the petitioner may have as an attorney at law." The director stated "the petitioner has failed to submit any documentary evidence of the criteria used to select recipients of [the [redacted] award," and found that the petitioner's other claimed honors do not appear to have anything to do with the practice of law.

The director quoted *Matter of New York State Dept. of Transportation* regarding pro bono legal services, and stated that the petitioner had not shown how his involvement in partisan fundraising activities lent national scope to his private law practice.

In response, the petitioner claimed to be "surprised" that the director did not recognize the significance of the letter sent under [redacted] signature. The petitioner stated: "The letter says that 'Due to your tireless efforts, we've been able to make so much progress here in Washington to keep our citizens safe, our economy prosperous and our families free. . . .' That is surely more than a thank you letter for co-sponsoring a dinner." The petitioner failed to specify the "tireless efforts" in question. It remains that the letter specifically thanked the petitioner "for agreeing to serve as a National Co-Sponsor of The President's Dinner"; it did not identify any other contribution or activity by the petitioner.

The petitioner stated that he received the [redacted] Award because he "devoted over 100 hours to pro bono legal service." The petitioner did not submit documentary evidence to support this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Regarding his various certificates from [redacted], the petitioner stated: [redacted] never asked me for money before giving me those awards. Simply put, I did not buy any of those awards. I respectfully ask you to verify this assertion by calling [redacted] The director is under no obligation to seek out, solicit, or obtain evidence on the petitioner's behalf. The petitioner submitted nothing

from [redacted] to support his claims, and his demand that USCIS get the evidence for him carries no weight in his favor.

Regarding the claim that the petitioner "was invited as an expert lawyer to represent California at the tax Summit," the petitioner asserted: "Under California Evidence Code and Federal Rules of Evidence, an attorney may qualify as an expert to testify on any area of law." The "tax Summit" was not a trial or legal proceeding. It was, instead, an event sponsored by an [redacted]-affiliated organization. It may well be that the petitioner may lawfully testify about matters of law, but this is irrelevant to the petitioner's claim that the United States government called on the petitioner to offer advice as a representative of the State of California.

The petitioner's response to the director's notice consisted largely of a series of unsubstantiated claims. He claimed, for instance: "My *successive* invitation to Washington D.C. on four separate occasions . . . means that the then Republican-controlled White house recognized my influence in the field" (emphasis in original). Nothing in the record supports this claim.

The petitioner then argued that "NYDOT appears to be a bad law," even while acknowledging that the director was "bound to apply the NYDOT to this case." The petitioner contended: "I do not think that [the third prong of the *Matter of New York State Dept. of Transportation* national interest test] can survive judicial scrutiny."

Matter of New York State Dept. of Transportation is a published precedent decision, and (as the petitioner acknowledges) is therefore binding on all USCIS officers pursuant to 8 C.F.R. § 103.3(c). Moreover, contrary to the petitioner's prediction that the decision cannot "survive judicial scrutiny," it has, in fact, survived federal court challenges without being overturned. *See e.g. Talwar v. U.S. I.N.S.*, 2001 WL 767018, S.D.N.Y., 2001.

The petitioner asserts that "an alien can qualify as an alien of exceptional ability . . . without meeting the second prong of the NYDOT formulae." This is true but irrelevant. It is clear, from the plain wording of the statute, that "exceptional ability" is not automatic grounds for a national interest waiver. Rather, section 203(b)(2)(A) refers to aliens of "exceptional ability . . . whose services . . . are sought by an employer in the United States." An alien of exceptional ability is, therefore, subject to the job offer requirement unless the petitioner can show that an exemption would be in the national interest.

The director denied the petition [redacted], 2010, having found the petitioner's claims to be exaggerated and unsupported. On appeal, the petitioner protests that the director "clearly ignored" the petitioner's invitation "by the personal assistants [redacted] to Washington D.C. on four successive occasions where issues of national interests were discussed." The director did not "ignore" this claim, but the petitioner has submitted nothing of any substance to prove that the evidence of record has the significance that the petitioner claims it has. The petitioner has not submitted anything from [redacted] or any other entity to state the reason(s) for these invitations. The petitioner maintains that the invitations have nothing to do with fundraising, but he has not

provided any other plausible and documented explanation. Instead, the petitioner complains that the director has not sought out and obtained evidence to support his claims. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, the onus is entirely on the petitioner to show that he qualifies for the benefit sought. There is no presumption of eligibility that the director must overcome in order to justify denying the petition. Rather, the petitioner must justify the approval of the petition.

The petitioner repeats several of the arguments against *Matter of New York State Dept. of Transportation*, even in the face of the director's correct observation that all precedent decisions are binding on all USCIS employees. At one point, the petitioner argues:

> Another flaw of NYDOT is clearly seen in cases involving physicians. Everyone knows that someone saving lives serves the national interest. Before the NYDOT case, the USCIS routinely granted the waiver to Physicians. However, after NYDOT case, the USCIS often deny [*sic*] National Interest Waiver (NIV) [*sic*] to physicians because of the way the AAO has interpreted the phrase "national interest" in the NYDOT case since each physician's activity is geographically localized. Congress recognized the problem AAO has caused physicians by its decision in NYDOT's case and have passed a new law which does not require any physician to show that he/she is the best in the field of medicine in order to qualify for a "national interest waiver" of a job offer. See INA 203(b)(2)(B), Public Law 106-95 § 5 permitting NIW for physicians in shortage areas.

Leaving aside oversimplifications and inaccuracies in the above account that are outside the purview of the present decision, the petitioner is correct that Congress acted in direct response to the *Matter of New York State Dept. of Transportation* precedent decision. Congress, at that time, could have issued any number of legislative remedies; it was Congress that created the waiver, and Congress has the authority to shape that waiver as it sees fit. Significantly, Congress did not take broad action to nullify or reverse *Matter of New York State Dept. of Transportation*. Instead, Congress crafted a narrow exception – not for all physicians, but for certain physicians practicing in medically underserved areas. With this specified exception, Congress left *Matter of New York State Dept. of Transportation* alone. In so doing, Congress effectively (if passively) endorsed the precedent decision. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.)

The petitioner protests: "I am told by the Director to look for a job and have my employer file a labor certification for me when no one is hiring. In fact, lawyers are being laid off by big law firms." The petitioner submits no evidence to support this claim, but assuming it is true, the AAO reiterates that Congress intended the job offer requirement to protect United States workers. The petitioner asserts that he merits a special exemption to bypass these protections. There exists no blanket waiver for attorneys. The petitioner must show that he, specifically, will serve the national interest to an extent that would justify this exemption. The petitioner has submitted no relevant documentation in this

regard. Instead, he has focused on evidence from partisan campaign organizations, and claimed (with no proof) that these organizations have paid special attention to him not because of political contributions, but because of his achievements in the field. What those achievements are, the petitioner does not say, except that he has performed pro bono work (specifically addressed in *Matter of New York State Dept. of Transportation*) and the vague (and again unsupported) claim that only a very good attorney could have handled as many cases as he has.

Several months after he filed the appeal, [redacted], 2010 the petitioner submitted a supplement to the appeal. The new evidence shows that the petitioner has "complied with all applicable requirements for certification in consumer bankruptcy law" by the American Board of Certification. The petitioner asserts: "My certification clearly shows my degree of influence in the field of law." The petitioner fails to explain how this is the case, as nothing in the record shows that "influence in the field of law" is a requirement for certification. Rather, the requirements include experience, continuing legal education, and a written examination.

The beneficiary received this certification in December 2010. Therefore, even if it were strong evidence in favor of granting the waiver (which it is not), it came along more than a year after the petitioner filed the petition. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The record amply shows that the petitioner has made contributions to [redacted] and related partisan political organizations. For example, a July 30, 2007 letter from [redacted] then chairman of the [redacted], thanked the petitioner for his "generous donation, and [his] continued dedication to regaining our Republican majority in Congress." A legend at the bottom [redacted] letter states: "Contributions from . . . foreign nationals are prohibited."

The "Foreign Nationals" brochure from the Federal Election Commission (FEC) states: "The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly. . . . Persons who knowingly and willfully engage in these activities may be subject to fines and/or imprisonment." The "Foreign Nationals" brochure is available online at http://www.fec.gov/pages/brochures/foreign.shtml (printout added to the record July 6, 2011). The relevant statutory language at 2 U.S.C. § 441e reads:

> Contributions and donations by foreign nationals
> (a) *Prohibition.* It shall be unlawful for—
> (1) a foreign national, directly or indirectly, to make—
> (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;
> (B) a contribution or donation to a committee of a political party; or

(C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3)) (2 U.S.C. § 434(f)(3)); or

(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.

(b) As used in this section, the term "foreign national" means—

(1) a foreign principal, as such term is defined by section 611(b) of title 22,2 except that the term "foreign national" shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States or a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act) and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20) of title 8.

The AAO cannot rule definitively on whether or not the petitioner violated federal election law by making contributions to partisan political campaigns. Jurisdiction over that issue rests with the FEC. Nevertheless, by prohibiting and criminalizing political contributions from foreign nationals, Congress has effectively declared such contributions to be against the national interest. Therefore, if the petitioner's contributions were in violation of federal law (as appears to be the case), then this violation would contradict the argument that the petitioner acted in the national interest by making the contributions.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.